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COURT OF APPEALS  
DIVISION II

2016 AUG 17 AM 11:20

STATE OF WASHINGTON

Court of Appeals No. ~~BY48626-1-II~~ (1)  
Superior Court No. 12-2-02585-3

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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F.P.H. CONSTRUCTION, INC., a Washington Corporation,

Respondent,

v.

ESHMAIL SHAHREZAEI,

Appellant,

and

JANE DOE SHAHREZAEI; MAHMOUD SHAHREZAEI and JANE  
DOE SHAHREZAEI, husband and wife; and C&SH ENTERPRISES,  
LLC, a Washington Limited Liability Company,

Defendants.

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REPLY BRIEF OF APPELLANT

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Ahmet Chabuk  
Attorney for Appellant  
WSBA No. 22543  
11663 Ivy Lane NW  
Silverdale, WA 98383  
(360) 692-0854

P/m 8/15/16

REPLY BRIEF  
OF APPELLANT, ESHMAIL SHAHREZAEI

IN PAGE 3 of Brief of Respondent; the **respondent construction company (FPH)** acknowledges the fact that the defendant C&HS company is “**now defunct.**”

IN PAGE 3 of Brief of Respondent; in the **Restatement of the Case**; FPH is trying to conduct a trial by affidavits or declarations for its motion for summary judgement against Eshmail Shahrezaei (Eshmail). Yet there is no mention of Eshmail Shahrezaei in the Complaint (as an owner or a manager of the business) – other than a “mistaken” allegation that Eshmail was the “wife” of Mahmoud Shahrezaei (**Mahmoud**). (CP 4, lines 5-8)

In its Complaint, in section III, FPH states: “*Defendant, C&SH Enterprises, LLC owns and operates a restaurant, and defendant Mahmoud Shahrezaei is the **Managing Member** of the LLC.*” No evidence exists in record that Eshmail Shahrezaei (**Eshmail**) owned any part of the business or that he had any authority to sign any contracts on behalf of the business, “C&SH,” and why he should be responsible personally for the alleged contracts which his brother Mahmoud may have signed on behalf of the business.

FPH offered no arguments or any authorities as to, if Eshmail had the authority to sign business checks from the account of C&SH

(business,) would that authority imply that Eshmail was the owner of the business or whether he should be personally liable to FPH for the work done on the rented building.

IN **PAGE 4** of Brief of Respondent; FPH is arguing that *“neither brother disclosed to the Plaintiff that the business was actually a Limited Liability Company known as C&SH Enterprises, LLC.”* Interestingly, the Complaint is a verified one, made under penalty of perjury, and Eshmail is referred to in the complaint only as the wife of Mahmoud. (CP 3). If Eshmail had signed the contracts in presence of the witness of FPH, it would have been virtually impossible that Essie would have been identified as the “wife” of Mahmoud in the complaint.

IN **PAGE 5** of Brief of Respondent; FPH is claiming that it **billed the defendants**. But in the complaint, there was no mention of the name of Eshmail (other than as the wife of Mahmoud). And all bills/ invoices were addressed to Mahmoud and C&SH (to the business) only, and no demands were made to Eshmail. FPH has in the record no invoices or demands for payment made to Eshmail.

IN **PAGE 6** of Brief of Respondent; FPH admits that *“Eshmail . . . deny he signed the both contracts . . .”* and tries to compare some alleged sample signatures as if the parties were testifying at a trial. Yet, FPH admits that the comparison of signatures

must be done before a trier of the fact.

IN **PAGE 8** of Brief of Respondent; FPH is arguing that *“prior to the arbitration, Plaintiffs counsel notified counsel for the defendants and it would be making an oral motion to amend the complaint to conform with the evidence, including that Mahmoud Shahrezaej and Eshmail Shahrèzaej were brothers and not husband and wife and there were two written contracts instead of one.”*

This argument is incorrect and is contrary to the record. The arbitration record is sealed once the notice for trial de novo was filed. However, it became obvious only during the arbitration hearing, while Eshmail testifying over the phone, that Eshmail was not a “wife” but a brother. The defendants had no objections to make the correction to the “mistake” as to “wife” vs “brother.” However, contrary to the argument (at page 8), the “correction” was not done and the **arbitration award** was entered *“against defendants Mahmoud and Eshmail Shahrezaei, and **their marital communities, jointly and severally.**”* (CP 20). The fact that they are not husband and wife but are brothers still is NOT reflected in the arbitration award. (CP 20). Moreover, the arbitration award did not include an award against defendant business C&SH. (CP 20).

**Complaint** filed: 11-30-2012. (CP 3).

**Answer** from Eshmail filed: 06-21-2013. (CP 17).

Date of **arbitration**: 7-29-2014. (CP 20).

**Arbitration** award: 8-18-2014. (CP 20).

Motion to **Amend complaint** was filed more than six months after the arbitration, on 02-25-2015. (CP 22) -- more than 1 year and 8 months after the Answer was filed.

**Amended Complaint** was entered on 03-24-2015, long after the arbitration was completed. (CP 59).

Motion for **Summary Judgment** filed: 09-02-2015. (CP 84).

IN **PAGE 9** of Brief of Respondent; the argument that “*the Declaration of Ronald C. Templeton advising that an oral motion to amend was made prior to arbitration*” is not supported by the record and is speculative. It is irrelevant here. The motion to amend the complaint was made almost a year after award of the arbitration and more than one year and 8 months after the Answer was filed. And no “**just cause for the delay**” was even offered to the court for a consideration. However; under the pretext of correcting a “mistake,” FPH filed an amended complaint and went far beyond the scope of correcting a “mistake.”

IN **PAGE 12** of Brief of Respondent; there is no factual or legal basis for the FPH argument that “*Appellant Eshmail Shahrezaei did not dispute the following facts before the trial court: That Eshmail is an owner of the Bistro restaurant; That Eshmail represented and*

*held himself out to FPH as an owner of the Bistro restaurant.”*

FPH moved for summary judgment and has the burden of proof that there are no issues of material fact, based on pleadings, depositions, admissions, etc. FPH has submitted no evidence in support of its conclusory arguments except their hearsay speculations. In fact, FPH admits that all of the defendants are defunct now. No evidence in record that the work done on the building benefits Eshmail, who went back home in Florida after defendants lost everything and vacated the rented building. (CP 19; 88; 263).

If Eshmail had been authorized write payroll checks on behalf of the business C&SH, that did not mean he was authorized to sign contracts on behalf of the business. There can be no justification that Eshmail , personally, should be liable to FPH for the loss of the business. Admittedly, defendants lost everything and had to vacate the rented building. There is no evidence to support the allegations in page 12 of respondent’s brief.

**In page 13;** it is incorrect for FPH to claim that *“The written contracts were admittedly signed by at least one of the owners.”* Eshmail repeatedly denied having joined his brother in signing the contracts. If the contracts were signed by one person, it is not for Eshmail to admit that it was. There is no evidence to suggest that Eshmail was a witness to its signing. In fact, the second contract

appears to have only one signature for one “owner” and the second contract was not even a part of the initial Complaint. (CP 45).

IN **PAGE 14** of Brief of Respondent; FPH is misleading with its quotations of Eshmail that *"I have never entered into any contract or agreement with Plaintiff"* and *"I also have not benefitted from any work or services provided by Plaintiff were properly stricken by the trial court as conclusory and inadmissible"* is misleading. What is missing there is that, in his declaration, Eshmail declared that he did not sign the alleged contracts. This sentence is a factual statement and was NOT stricken by the court. The order striking parts of Eshmail's declaration **did not strike his statement that he did not sign the contracts** – even though the order erroneously did strike the words he “never entered into any contract or agreement . . . and have not benefitted from any work or services.” (CP 280).

IN THE SAME **PAGE 14** of Brief of Respondent; there is no merit to FPH to claim and argument that they had made a motion to amend the complaint prior to the arbitration – while there is no record of the claim and the motion to amend was made very long time later and without any “just cause for the delay.”

IN THE SAME **PAGE 14** of Brief of Respondent; the argument for a quantum meruit is also without merit while the legal theory for it was not properly made in the complaint, the real issues is a lack of

showing that the defendants benefitted by the work done in light of the fact that FPH never made a claim against the owner of the building, and the fact that all defendants are out of business, have lost everything, had to vacate the rented building and moved out of the state. The landlord must have benefitted by the work done on the building but FPH made no claims against the landlord. There is no basis for a quantum meruit action.

IN **PAGE 15** of Brief of Respondent, FPH's argument could not have been made in good faith; that "*Fourth, Eshmail Shahrezaei is liable to FPH for breach of contract. The two written contracts were called for the installation of fire suppression system . . . Both written contracts have a signature page with two signatures by Mahmoud Shahrezaei and Eshmail . . .*"

In reality, the second contract does not even have two signatures for the "owner." The **second** contract, dated 25<sup>th</sup> of January, 2010, was apparently **signed by only** one person, on behalf of an "Owner," apparently signed by Mahmoud only – as the owner of the business – not as the owner of the building). (CP 45); (CP 80).

Admittedly, Eshmail has been denying he had joined his brother in signing any of the contracts. This fact was apparent when the complaint was signed under penalty of perjury to be truthful and correct and Eshmail was named there as the "wife" of Mahmoud. After



the arbitration and the discovery that he was not a wife but a brother, the speculations began to show up in support of the motion to amend the complaint. FPH may not have a summary judgment granted based on speculative declarations and by a hand-writing experts without being subjected to cross examinations before a trier of fact.

IN **PAGE 19** of Brief of Respondent, in Section B; the allegation that the court “*allowed plaintiff to amend its complaint to conform with a prior action to amend made at arbitration*” does not have any basis and not based on the record.

First, the arbitration proceedings (held on 8-18-2014) are sealed once a notice for a trial de novo is filed. And the arbitration proceedings may not be disclosed. MAR 7.2(a) and (b). Second, there is no record of such a motion having been made – not until 2-25-2015 (CP 22). Third: The arbitration award still named Mahmoud and Eshmail as a “marital community” (CP 20). Fourth: The arbitrator did not have the authority to amend the complaint and to “add parties to the case . . . .” That authority is reserved for the court, not to the arbitrator. MAR 3.2(b)(1).

The motion to amend was done under a pretext of mistake but added spouses long after the arbitration was concluded and an arbitration award was entered. The spouses were added to the names of Mahmoud and Eshmail and to their marital community. The

amended complaint adds the wives of both Mahmoud and Eshmail, and denies the wives their constitutional right to the due process.

Also, the amended complaint adds a claim for a second contract, admittedly not signed by Eshmail, which was not before the arbitrator. The amended complaint, not only “corrects the mistakes” as to Mahmoud and Eshmail from being husband and wife to being brothers, but imposes burdens on the wives without benefit of the arbitration and with burdens of a second contract.

IN **PAGE 20** of Brief of Respondent; contrary to the arguments, in page 20, the arbitration award does NOT reflect that the motion to amend was granted. On the contrary, the arbitration award was against Mahmoud and Eshmail Shahrezaei and their marital community jointly and severally.” There is nothing in the arbitration award to indicate that the wives of Mahmoud and Eshmail were added as new defendants. In fact, the wives could not have been added without violation of their rights to the due process of the law. (CP 20).

Moreover, the arbitrator did not have the authority to amend the complaint and to add parties to the case. That authority is reserved for the court, not to the arbitrator. MAR 3.2(b)(1).

IN **PAGE 21** of Brief of Respondent, **in Section C**; the argument that plaintiff’s amended complaint properly plead a Quantum Meruit Cause of Action has no merit.

The motion to amend the complaint was brought more than 1 year and 8 months after the Answer was filed. And it was brought up with the pretext of correcting a mistake naming the brothers as husband and wives instead of brothers. And the amended complaint added a second contract dispute, which admittedly and allegedly was signed by only one "owner." The wives of the brothers were added long after the arbitration was concluded and the arbitration award was entered. Moreover, no "just cause for delay" was offered to justify granting of the motion to amend. And no evidence was submitted as to any alleged acts by defendants were done for the benefit of the marital community of the brothers.

Moreover, admittedly, the business being defunct, and the defendants having lost everything together with the business, and the rented building, there can be no argument that the defendants have benefitted by the work done by FPH on the rented building – while in fact, the landlord would be enjoying the benefits. There is no justification for a claim for quantum meruit.

In addition, FPH offered no evidence that Eshmail requested the work and how Eshmail might have benefitted by the work.

**IN PAGE 26** of Brief of Respondent, **in Section D**; As indicated above, Eshmail submitted a declaration and stated: *I did not sign the contracts that Plaintiff, F.P.H CONSTRUCTION, INC., alleges*

*I signed. I have never entered into any contract or agreement with Plaintiff or anyone acting on Plaintiff's behalf. I also have not benefitted from any work or services provided by Plaintiff or anyone acting on Plaintiffs behalf. (CP 263).*

The trial court did not strike the first sentence "*I did not sign the contracts that Plaintiff, F.P.H CONSTRUCTION, INC., alleges I signed,*" but erroneously did strike the rest. (CP 280).

IN **PAGE 29** of Brief of Respondent; FPH is erroneously arguing that Eshmail was "*required to provide the court with factual statements that show why he did not benefit from the work performed by FPH.*" FPH, itself, is the party who moved for a summary judgment and has the burden to prove that there are no issue of material and that it is entitled to judgment as a matter of law.

IN **the same PAGE 29** of Brief of Respondent; FPH argues that Eshmail is liable to FPH and admits that it had to prove a valid contract between the parties. However, FPH's claim that Eshmail did not dispute this-and-that fact is not valid while FPH still has the burden of proof that there are no issues of material fact and it is entitled to a judgment as a matter of law.

FPH incorrectly argues that Eshmail did not dispute its arguments that Eshmail had signed or was involved in the two contracts. This argument is contrary to admissions of FPH that

Eshmail has been denying that he had signed the contracts.

IN **PAGE 30** of Brief of Respondent; FPH incorrectly argues that “FPH timely invoiced the defendants for this work.” This is an incorrect statement because there is not even one copy of an invoice sent to Eshmail. The citations provided by FPH to the record are all speculations while none of them have a copy of an invoice made out to Eshmail.

Moreover, even if Eshmail had signed any payroll checks on behalf of the business, from the bank account of the business, that would not make Eshmail an owner of the business and personally liable to FPH for any construction work done on the rented building.

The names of Mahmoud and Eshmail scribbled on the “contracts” were obviously done by FPH and while under its own control. Eshmail has denied having signed them.

IN **PAGE 31** of Brief of Respondent; FPH relates a declaration of a Stephanie Navarez, and argues that “*she is familiar with Essie's signature and **she is certain** that it is Essie's signature on **both contracts.**” This argument cannot be made in support of a motion for a summary judgment. The witness may make such a statement at a trial before the trier of fact subject to cross examination.*

Interestingly, the second contract has only one signature for the “owner,” presumably by Mahmoud. Therefore, the declarant’s

reference to “*Essie’s signature on both contracts*” cannot be correct. It would not be truthful to argue that “**she is certain**” it is Eshmail’s signature “on **both** contracts.” These argument cannot be used for a motion for summary judgment. A trial by disputed affidavits is not the right procedure for a motion for a summary judgment.

Interestingly, on **page 32 of the response**; FPH admits that “*the weight of such testimony is, of course, for the jury.*” *State v. Brunn, 144 Wash. 341, 258 P. 13 (1927).*”

IN **PAGES 34 and 35** of Brief of Respondent; “the alternative to liability” argument of FPH on “Quantum Meruit” cannot be persuasive. FPH failed to prove that Eshmail had an ownership interest in the building rented by the business, had any ownership interest in the business, that he signed the contracts, that he asked for the work to be done on the building, or that he personally benefitted by the work done on the rented building which was used by the business.

FPH offered no evidence that Eshmail’s involvement in helping in his brother Mahmoud’s business was for the benefit of his marital community. There are no allegation in the original complaint that the “husband and wife” were a **marital community**. (CP 3).

There is no basis to hold the spouses responsible for any alleged contracts with speculations and arguments that Eshmail may have

signed them. FPH's own Declaration of David Weibel, admits the argument that "Mike Shahrezaei," in a prior testimony, had testified that the defendants had **paid "more than sufficient amount** for the work was done." CP 229, line 24.)

The alleged contracts, in Section XII, have **arbitration clauses**, which requires the parties to go through arbitration. (CP 14); (CP 152); (CP 161); (CP 177); (CP 215). In violation of this arbitration clause, in the Amended Complaint, under **the pretext of correcting mistakes**, the **spouses were added without the benefit to the spouses of the arbitration clause** and the arbitration process because the complaint was amended long after the arbitration was concluded. The spouses were denied their right to have the arbitration in violation of their rights to the due process of the law.

In the Amended Complaint, by addition of a second contract claim, the defendants and their spouses are denied their rights to the arbitration as provided in the contracts and their rights to **due process of the law were** denied.

The defendants have asserted that they had paid a substantial part of the bills for the construction because the Complaint states that the "*invoice exceeded \$89,900 and defendants paid all but \$38,652.24.*" (CP 4). That was a substantial payment.

In "*Plaintiff's Motion for Summary Judgement*," FPH stated

that the plaintiff “billed the Defendants approximately \$120,000.00 for his this work of which \$53,878.62 was not paid,” which would mean that \$66,121.38 was paid by the defendants. (CP 86). This is a substantial part payment.

The first contract, dated 4<sup>th</sup> of November 2009, appears to show two signatures for the “owner.” (CP 15).

And its Attachment “Promissory Note,” was apparently made to the name of Mahmoud Shahrezaei (the owner of the business), and it is not signed. The name of Eshmail Shahrezaei, does not appear on the promissory note. (CP 16). This is a clear proof that Eshmail was not involved in formation of the contracts.

Moreover, the **second** contract, dated 25<sup>th</sup> of January, 2010, is apparently **signed only** one person, on behalf of “Owner,” apparently signed by Mahmoud only, as the owner of the business – not the owner of the building. (CP 45); (CP 80). Therefore, it was not signed by Eshmail.

All invoices were submitted to “*Old Town Bistro*” or to Mahmoud. And no invoices were submitted to the name of Eshmail Shahrezaei. (CP 234-262).

In “*Plaintiff’s Motion for Summary Judgement*,” FPH admits that Eshmail has been denying signing the contract: “*In this case, with the exception of Essie Shahrezaei, defendants do not dispute*



*there was a valid contract between the parties.”* (CP 90, line 9-10). Therefore, admittedly, there are issues of material fact and it was an error by the court to grant the motion for summary judgment.

In the same *“Plaintiff’s Motion for Summary Judgement,”* the plaintiff claimed that *“all admissible evidence indicates that Essie Shahrezaei signed **both Contracts.**”* (CP 90 lines 20-21). Yet, the record shows the second document has only one signature for the “owner” – not even an alleged signature by Eshmail. (CP 80).

In *Declaration of Michael Brown*, Mr Brown declares and admits that **“Essie Shahrezaei denied signing both contracts** despite the fact that his unique signatures . . . (CP 167 line 22).

Similarly, In *Declaration of David Weibel* (for the plaintiff), Mr Weibel declares that **“Essie denies signing both contracts** despite the fact that his unique signatures . . . (CP 230 line 7-8).

In his *Declaration of Eshmail Shahrezaei*, Eshmail declared that he *“did not sign the contracts that Plaintiff, FPH Construction INC., alleges I signed. I have never entered into any contract or agreement with Plaintiff or anyone acting on Plaintiff’s behalf. I also have not benefitted from any work or services provided by Plaintiff or anyone acting on Plaintiff’s behalf.”* (CP 263).

Without waving objections to entry of the Amended Complaint, the defendants note to acknowledgment of FPH that defendant

*“Shahrezaei and/or the LLC formerly owned and operated a restaurant . . . known as Old Town . . . Bistro.”* (CP 25 line 12-13); (CP 60, line 12-13). Therefore, FPH knew very well that the defendants have lost their business, have vacated their rented building, and moved out of the state.

In *“Plaintiff’s Reply in Support of Motion for Summary Judgment”* FPH admits as **“facts”** that *“the written contracts were signed by one of the owners of the Bistro restaurant.”* (CP 271 line 14; and line 6). This is a clear admission of the “fact” that defendant Eshmail Shahrezaei did not sign the contracts.

There is no evidence in the record to suggest that defendant **Mahmoud Shahrezaei** was the owner of the building where the business was located. There is no evidence in the record to indicate that defendant Eshmail Shahrezaei was the owner of the building or he was an owner of the business.

FPH offered no arguments that, if Eshmail had been given the authority to write checks from the bank account of the business to the employees on behalf of the business C&SH, LLC, would that “authority” make him personally liable to FPH for any work done on the building rented by the business.

No evidence exists in record that FPH ever filed a construction lien or a mechanic’s lien on the building or made any claims for unjust

enrichment against the owner of the building.

Again, Plaintiff FPH still has a huge judgement against defendant Mahmoud Shahrezaei, which is not on appeal.

### **CONCLUSION**

The orders striking portions of Eshmail's declaration and granting summary judgment should be vacated, and the order allowing plaintiff FPH to amend its complaint to add both wives as new party defendants and a second written contract should be reversed.

Respectfully submitted on this August 15, 2016



Ahmet Chabuk (WSBA No. 22543)  
Attorney for Eshmail Shahrezaei, Appellant  
11663 Ivy Lane NW, Silverdale, WA 98383  
(360) 692-0854

### **DECLARATION OF SERVICE:**

I certify that on August 15, 2016, I mailed a true copy of this document to Mr. David A. Weibel, Attorney at Law, 3212 NW Byron Street Silverdale WA 98383.

